Supreme Court, U. S.
FILED
SEP 19 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-466

KENNETH SHALOM MILLROOD,

Petitioner,

vs.

SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

---

UNITED STATES OF AMERICA ex rel:
JAMES KIRCHNER,

Petitioner,

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA; D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOHN ROGERS CARROLL,
THOMAS COLAS CARROLL,
PETER GOLDBERGER,

CARROLL, CREAMER,
CARROLL & DUFFY,
Attorneys for Petitioner,
James Kirchner,
Suite 326,
Three Penn Center Plaza,
Philadelphia, Pennsylvania 19102
(215) 568-5200

DONALD J. GOLDBERG,
Attorney for Petitioner,
Kenneth Shalom Millrood,
1420 Two Girard Plaza,
Philadelphia, Pennsylvania 19102
(215) LO 3-6345

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IN THE

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OCTOBER TERM 1979

No.

KENNETH SHALOM MILLROOD,

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SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

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W. G. JOHNSTONE, JR., PRESIDENT JUDGE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled cases.

OPINIONS BELOW

The judgment orders of the United States Court of Appeals for the Third Circuit are unreported and are printed in Appendix A hereto at p. 1a-4a. The opinion of the District Court for the Eastern District of Pennsylvania is reported at 454 F. Supp. 14 (E.D. Pa. 1978) and is printed in Appendix B hereto at p. 5a.

JURISDICTION

The judgments of the Court of Appeals were entered on July 23, 1978 (1a-4a). Timely petitions for rehearing were denied on August 22, 1979 (14a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does not the due process clause of the Fourteenth Amendment prohibit a state from requiring the accused in a criminal prosecution to bear the burden of first producing some evidence as to the non-existence of an element of the crime before the prosecution need meet its burden of proving that element beyond a reasonable doubt?

2. Does not the due process clause of the Fourteenth Amendment prohibit a state from retroactively applying its newly announced burden-shifting rule to accused who had no reason whatsoever to know when tried that the defense must first come forward with some evidence as to the non-existence of an element of the crime before the prosecution need meet its burden of proving that element beyond a reasonable doubt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

The Controlled Substance, Drug, Device and Cosmetic Act of the Commonwealth of Pennsylvania [Act of April 14, 1972, P.L. 233, No. 64, §1 *et seq.*, 35 P.S. §780-101 *et seq.*] which provides in pertinent part:

35 P.S. §780-104: *Schedules of controlled substances*

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

(1) Schedule I—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule:

* * *

(iv) Marihuana.

35 P.S. §780-106: *Registration*

(a) No person shall operate within this Commonwealth as a manufacturer, distributor or retailer of controlled substances, other drugs and devices nor sell; offer for sale nor solicit the purchase of controlled substances, other drugs and devices nor hold them for sale or resale

until such person has registered under this act with the secretary. Such registration must be renewed annually in accordance with rules and regulations relating thereto.

(1) Any manufacturer or distributor not operating an establishment within this Commonwealth, but employing sales representatives or agents within this Commonwealth, shall either register as a manufacturer or distributor as the case may be, or file, in lieu of registration, with the secretary the names and addresses of such representatives and agents, and shall promptly inform the secretary of any changes in said list.

(2) Separate registration with the secretary shall be required annually for each place at which such person carries on activities as a manufacturer, distributor or retailer within this Commonwealth. The certificate evidencing such registration shall be conspicuously displayed and shall not be transferable.

(3) Registrations issued by the secretary or under the law preceding this act to manufacturers, distributors or retailers shall continue to be valid for the period issued and, upon expiration, shall be renewed in the manner provided for renewal of registration issued pursuant to this section. Nothing contained herein shall be construed to require the registration hereunder of any practitioner registered or the appropriate State board, nor to require the separate registration of agents or employes of persons registered pursuant to the provisions of this section, or of sales representatives or agents of manufacturers or distributors not operating an establishment within this Commonwealth whose names and addresses are on file with the secretary: Provided, however, That all persons registered pursuant to this section, whether located within this Commonwealth or not, shall be deemed to have accepted and shall be subject to all provisions of this act.

(b) No person shall operate as a manufacturer of controlled substances or other drugs unless they are manufactured under the supervision of a registered pharmacist, chemist or other person possessing at least five years' experience in the manufacture of controlled substances, or other drugs or such other person approved by the secretary as qualified by scientific or technical training or experience to perform such duties of supervision as may be necessary to protect the public health and safety.

(c) Each application for registration as a manufacturer, distributor or retailer shall be accompanied by a fee to be set by the secretary. Applications shall be on forms prescribed by the secretary. Registration shall be renewed annually and applications therefor shall be accompanied by the same fee as for initial applications.

(d) Initial registration shall become effective at noon on the sixtieth day after application therefor is filed: Provided, however, That the secretary shall have authority to issue a registration or to issue an order denying such registration pursuant to subsection (e) hereof at any time prior to the expiration of such sixty day period. Renewal of registration shall be effective upon certification by the secretary that the applicant has met all requirements for such renewal.

(e) The secretary may refuse the initial registration and may, after notice and hearing pursuant to the Administrative Agency Law, suspend registration (i) of any person who has made material false representation in the application for registration; (ii) of any manufacturer or distributor who has been convicted of a violation of any law of this Commonwealth or of the United States relating to controlled substances, if such refusal shall be necessary for the protection of the public health and safety; (iii) of any

manufacturer or distributor who knowingly employs in a capacity directly connected with the preparation, handling or sale of controlled substances any person convicted of a violation of the laws of this Commonwealth or of the United States relating to the sale, use or possession of controlled substances, if such refusal shall be necessary for the protection of the public health and safety.

(f) If the secretary takes any action refusing registration or revoking or suspending registration under subsections (e) and (f), the aggrieved party may, within fifteen days after the date upon which a copy of the order is delivered to the address indicated on the application or the registration whichever is applicable, petition the board for review. The board shall, within thirty days, grant a hearing and, as soon thereafter as practicable, adopt, modify or reject the action of the secretary. Any action by the board shall be deemed an adjudication to which the provisions of the Administrative Agency Law, as amended, shall be applicable.

(g) The following persons need not register and may lawfully possess controlled substances under this act:

(1) an agent or employe of any registered manufacturer, distributor, dispenser or any person listed in lieu of registration with the secretary if he is acting in the usual course of his business or employment;

(2) a common or contract carrier or warehouseman, or an employe thereof, whose possession of any controlled substance is in the usual course of business or employment;

(3) an ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a Schedule V substance.

35 P.S. §780-113: *Prohibited acts; penalties*

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

* * *

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

STATEMENT OF THE CASE

This petition presents the important issue left open in *Sandstrom v. Montana*, U.S. , 99 S. Ct. 2450 (1979), where this Court found it unnecessary to consider whether the accused might be constitutionally required to meet the initial burden of going forward with some evidence as to an essential element of the crime charged before the prosecution need meet its burden of proving the element beyond a reasonable doubt, and the further question—if constitutional—whether such a burden-shifting rule may be applied to persons tried before its announcement.

This case came to the federal courts upon application for a writ of habeas corpus there, following state court convictions which were sustained on appeal.

Petitioners were jointly tried, convicted and sentenced to prison upon a charge of possession with intent to deliver marijuana "by a person not registered" under Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, which requires that those who deal in such controlled substances annually register with the Secretary of Health and imposes criminal penalties upon those who deal in such substances without being registered. 35 P.S. §780-106, 780-113 (a) (30). The statute provides in pertinent part:

35 P.S. §780-113: *Prohibited acts; penalties*

> (a) The folowing acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> • • •
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

At trial, there was a complete absence of proof from either side on the question of registration. Defendants contended—at the trial level [1] and at every available state appellate level [2]—that non-registration was an element of the crime as to which the Commonwealth had the burden of proof beyond a reasonable doubt. Throughout these same proceedings, the Commonwealth successfully maintained that the burden of proof was on the accused.

By virtue of the decision in *In re Winship*, 397 U.S. 358 (1970), placement of the burden of proof depended largely upon whether non-registration was an element of the crime under Pennsylvania law. The trial judge ruled that non-registration "is not an element of the offense charged against the defendant and there is no burden on the Commonwealth to prove a lack of registration" (18a). On appeal to the Superior Court of Pennsylvania, defendants continued to preserve their federal constitutional claim that they could not be required to bear the burden of proving registration, that absence of registration is an essential element of the crime, and that failure of the State to present any evidence on that issue entitled them to be discharged. But, on April 22, 1975, in an unrelated case, the Superior Court of Pennsylvania reached and decided the precise issue against the petitioners. *Commonwealth v. Stawinsky*, 234 Pa. Super. 308, 339 A.2d 91 (1975). In *Stawinsky* the Superior Court held that non-registration was not an element of the crime in a controlled substance prosecution such as that here, and that the burden of proof as to registration was on the accused. As a result of *Stawinsky*, the Superior Court of Pennsylvania affirmed the judgments here without opinion.[3]

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1. By demurrer to the evidence, motion for directed verdict, and motion in arrest of judgment.

2. *Commonwealth v. Kirchner*, 233 Pa. Super. 776, 339 A.2d 786 (1975) (alloc. denied); *Commonwealth v. Millrood*, 233 Pa. Super. 726, 339 A.2d 537 (1975) (alloc. denied), *cert. denied*, 434 U.S. 826 (1977).

3. See footnote two.

Petitioners then sought to have the Supreme Court of Pennsylvania review the matter, but that Court—after considering the petition for almost two years—refused to entertain an appeal from the Superior Court's decision.[4]

In the meanwhile, however, the Supreme Court of Pennsylvania did decide that absence of a license is an essential element of the crime of carrying a firearm without a license which the Commonwealth must prove beyond a reasonable doubt, and reversed a conviction for carrying a firearm without a license where the record did not contain any evidence relating to defendant's lack of a license for the weapon. *Commonwealth v. McNeil*, 461 Pa. 709, 337 A.2d 840 (1975).

Millrood alone petitioned this Court for a writ of certiorari, but that was denied on October 3, 1977.[5]

Defendants next sought federal habeas corpus relief in accordance with 28 U.S.C. §2254 arguing that *McNeil* supported their position.[6]

In its opinion denying habeas corpus relief, the District Court acknowledged that if the Commonwealth had the burden of establishing non-registration beyond a reasonable doubt, the writ should be granted, but held that

4. See footnote two.
5. See footnote two.
6. While defendants' trial took place before *McNeil*, it took place after *Winship* had held that due process prevents conviction absent proof beyond a reasonable doubt of every essential element of the crime charged, and defendants must be given the benefit of the *Winship* holding. *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3 Cir. 1978). In addition, this Court has recently held that the requirement of *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), that the prosecution prove every fact necessary to constitute the crime beyond a reasonable doubt, is to receive full retroactive application. *Hankerson v. North Carolina*, U.S. , 97 S. Ct. 2339 (1977). Following this lead, the Superior Court of Pennsylvania reversed its own earlier decisions and now acknowledges that cases such as *McNeil* must be applied retroactively. *Commonwealth v. Foster*, 250 Pa. Super. 32, 378 A.2d 438, 439 (1977).

the *Stawinsky* decision established for Pennsylvania that non-registration was not an element of the specific crime charged, and therefore that the Commonwealth did not have the burden of establishing this element beyond a reasonable doubt. After the District Court's decision, however, and while the case was on appeal to the United States Court of Appeals for the Third Circuit, the Superior Court of Pennsylvania, in *Commonwealth v. Sojourner*, Pa. Super. (No. 2387 October term, 1976, filed July 12, 1978) (*"Sojourner I"*), reversed its own thinking, concluded in light of *McNeil, supra*, that *Stawinsky* could no longer be regarded as good law, and held that non-registration is an element of the crime which the Commonwealth has the burden of proving beyond a reasonable doubt. . . . *This is the identical position long espoused by petitioners.*

Upon reargument, however, the Superior Court modified *Sojourner I*. While reaffirming that *Stawinsky* was bad law and that the burden of proving non-registration was upon the Commonwealth, the Superior Court *for the first time in Pennsylvania* held that the Commonwealth need not meet its burden of proving non-registration until the accused first met the initial burden of coming forward with some evidence of registration sufficient to activate the Commonwealth's burden of proving that element beyond a reasonable doubt. *Commonwealth v. Sojourner*, Pa. Super. (No. 2387 October term, 1976, filed June 22, 1979) (*"Sojourner II"*).

Relying entirely upon *Sojourner II*, the United States Court of Appeals for the Third Circuit then affirmed the judgment of the District Court denying habeas corpus relief on the new ground that petitioners had failed to activate the Commonwealth's trial burden of proving non-registration beyond a reasonable doubt by first presenting

some evidence of registration—albeit *Sojourner II's* burden-shifting rule was not announced until some six years after the trial of petitioners actually took place.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Constitution prohibits the conviction of anyone except upon proof beyond a reasonable doubt of every element of the crime charged. *In re Winship,* 397 U.S. 358 (1970); *Jackson v. Virginia,* – U.S. –, 99 S. Ct. 2781 (1979). This standard of proof beyond a reasonable doubt plays a vital role in the American scheme of criminal procedure, operates to give concrete substance to the presumption of innocence, ensures against unjust convictions, and reduces the risk of factual error in criminal proceedings. *In re Winship, supra.* It symbolizes the significance that our society attaches to the criminal sanction and to liberty itself, and has prevailed in our courts "at least from our early years as a Nation." *Id.,* at 361, 372.

In decisions subsequent to *Winship* this Court has never departed from this standard of proof or from placement of the burden of proof upon the prosecution. See, *e.g., Ivan v. New York,* 407 U.S. 203 (1972); *Lego v. Twomey,* 404 U.S. 477 (1972); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Patterson v. New York,* 432 U.S. 197 (1977); *Cool v. New York,* 409 U.S. 100 (1972); *Sandstrom v. Montana, supra; Jackson v. Virginia, supra.*

This case presents a perfect record for this Court to consider whether these venerable principles must give way to a state law which relieves the prosecution of its burden of persuasion as to an element of the crime unless the accused first produces some evidence to the contrary.

Sojourner II established for Pennsylvania that "non-registration" is an essential element of the crime here charged—a proposition which these accused had unsuccessfully maintained at the trial level and at every step of the way thereafter. At the same time, however, *Sojourner II* also held that the Commonwealth need not meet

its burden of proving non-registration until the accused first met the initial burden of coming forward with some evidence of registration sufficient to activate the Commonwealth's burden of proving that element beyond a reasonable doubt.[7] If the accused does not meet that burden of production, the trial judge either deletes "non-registration" as an element of the crime the jury must find proved beyond a reasonable doubt, or directs the jury to consider "non-registration" as a proved fact.

In *Sandstrom v. Montana, supra,* this Court held that a conclusive presumption as to an element of the crime or a rebuttable presumption which had the effect of shifting the burden of persuasion to the accused would not pass constitutional muster, but found it unnecessary to consider what kind of constitutional analysis would be appropriate for a presumption rebuttable by defense production of "some" contrary evidence. This case presents the logical next step in the continuing delineation of the meaning of *Winship,* and—because of the clarity of the record—offers an ideal vehicle for this Court to provide the authoritative guidance needed by federal and state courts confronting the constitutional validity of the kind of burden-shifting procedure here involved.

Unfortunately, the summary judgment orders of the Court of Appeals ignored the fact that the Pennsylvania Supreme Court had already denounced the burden-shifting procedure adopted in *Sojourner II,* and further failed to consider the entirely separate question whether federal constitutional law prohibits such burden-shifting. Instead,

7. In effect, *Sojourner II* creates a mandatory presumption of non-registration even though there be no logical connection whatever between that which is proved and that which is presumed. Such a presumption passes none of the standards of constitutional validity heretofore adopted by this Court. *E.g., Tot v. United States,* 319 U.S. 463 (1943); *Turner v. United States,* 396 U.S. 489 (1970); *Barnes v. United States,* 412 U.S. 837 (1973); *County Court v. Allen,* — U.S. —, 99 S. Ct. 2213 (1979).

the Court of Appeals simply accepted *Sojourner II* as the governing law, found that the accused had failed to activate the prosecution's burden of proof and on that different ground affirmed the judgments of the District Court denying these petitioners relief.

Had the Court of Appeals analysed Pennsylvania law it would have found that the Supreme Court of Pennsylvania itself had left no doubt that the burden of production, as well as the burden of persuasion, remains upon the Commonwealth throughout with regard to every essential element of the crime charged and can never be shifted to the accused. *Commonwealth v. Bonomo,* 396 Pa. 222, 229-231, 151 A.2d 441, 445-446 (1959); *Commonwealth v. DiFrancesco,* 458 Pa. 188, 193-194 n.3, 329 A.2d 204, 207-208 n.3 (1974); *Commonwealth v. Slaybaugh,* 468 Pa. 618, 364 A.2d 687 (1976). According to the Supreme Court of Pennsylvania, such burden-shifting devices as that adopted in *Sojourner II* are the equivalent of a directed verdict and as such in violation of federal and state requirements that the Commonwealth prove every element of the crime beyond a reasonable doubt, that all men are innocent until proved guilty, and that no one criminally accused may be compelled to testify. *Id.* The language used in *DiFrancesco* is representative of the view of Pennsylvania's highest court:

> ". . . [defense] failure to meet this burden of production will normally result in binding instructions on the issue of the presumed fact's existence in favor of the party [prosecution] invoking the presumption. But the notion of a directed verdict against a criminal defendant is contrary to accepted tenets of criminal justice. Placing the burden of production on a defendant under the threat of such a sanction would run afoul of the presumption of innocence as well as the defendant's privilege of declining to testify.

> Thus, where the presumed fact constitutes an element of the crime charged, the inference authorized by a presumption can never be compelled by the Court." 458 Pa. at 193 n.3, 329 A.2d at 207 n.3.

Apparently the Superior Court in *Sojourner II* misread *Patterson v. New York*, 432 U.S. 197 (1977), as authorizing the burden-shift it adopted [8] and took *Patterson* as its authority to ignore the decisions of its own Supreme Court decided on both state and federal grounds. In doing so, however, the Superior Court made no mention whatever of its own post-*Patterson* decision, *Commonwealth v. Gearhart*, — Pa. Super. —, 384 A.2d 1321 (1978), in which it followed *DiFrancesco*, and itself condemned any device whereby the burden of producing evidence as to an element of a crime was shifted to the accused. The Superior Court said in *Gearhart:*

> "In criminal cases, statutory presumptions and common law inferences may be used as evidentiary devices to aid the Commonwealth in proving an element of an offense beyond a reasonable doubt. *Commonwealth v. Bonn*, 244 Pa. Super. 315, 368 A.2d 738 (1976). However, if the fact to be presumed comprises an element of the alleged offense, the court may never compel the inference, *Commonwealth v. DiFrancesco*, 458 Pa. at 193, n.3, 329 A.2d 204, for that would amount to a shifting of the burden of producing evidence to the defendant and, in effect, a directed verdict of guilty if the accused fails to rebut.[2] Directed verdicts of guilty in criminal cases negate the presumption of innocence and, as such, are never permissible. *Commonwealth v. Turner*, 456 Pa. 116, 317 A.2d 298 (1974).
>
> 2. A discussion of the weight of a presumption in a criminal case can be found in McCormick, Evidence 804-805 (2d ed. 1972). In relevant part he writes,

8. As pointed out in Judge Spaeth's concurring opinion, *Patterson* is an "affirmative defense case" not an "element of the crime case."

> 'In criminal cases, however, there are rules that traditionally have been labeled presumptions, even though they do not operate to shift even the burden of producing evidence. A true shifting of the burden of producing evidence to the defendant in a criminal case would mean that the court would be compelled to direct the jury to find against him with regard to the presumed fact if he fails to introduce sufficient proof on the issue . . . . [A] directed verdict on a preemptory ruling against the accused in a criminal case, even as to a single element of the crime, is abhorrent to the criminal law. Therefore, modern draftsmen, while retaining the term, presumption for criminal cases, have reduced the effect of presumption in those cases to that of a standardized inference. The jury is permitted but not required to accept the existence of the presumed fact even in the absence of contrary evidence.' *Id.* at 804 [Footnotes omitted.]" *Id.* at 1323.

Entirely apart from Pennsylvania law on the issue, this Court, in *Sandstrom*, although reserving the question for future review, specifically noted:

> ". . . that the effect of a failure to meet the production burden is significantly different for the defendant and prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S. Ct. 1349, 1355, 51 L.Ed 2d 642 (1977); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408, 67 S. Ct. 775, 782, 91 L.Ed. 973 (1947); *Mims v. United States*, 375 F.2d 135, 148 (CA5 1967)." *Id.*, at , 99 S. Ct. at 2455 n.5.

Years earlier, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court observed:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. *Tot v. United States*, 319 U.S. 463 (1943)." *Id.* at 525-526.

Thus, while this Court's direction seems clear the question was left open in *Sandstrom* and ought to be definitively resolved early because of its importance to federal and state criminal procedure.

But, even if the Superior Court's opinion in *Sojourner II* is found to be constitutionally valid under state and federal law, retroactive application of the Superior Court's newly announced burden-shifting rule to these accused—who had no reason whatsoever to know that they must first come forward with some evidence of registration in order to activate the Commonwealth's burden of proving non-registration—would itself be a violation of due process. At the time this case was tried the defense was entitled to rely upon the decision of the Pennsylvania Supreme Court in *Commonwealth v. Bonomo, supra,* holding that the burden of going forward with evidence as to any essential element of the crime charged could never be shifted to the accused. Moreover, at trial, and for all the years up to *Sojourner II,* the only question was which side had the burden of persuasion—the burden of production was never at issue. The prosecution successfully convinced the trial judge to place the burden of proof as to non-registration

upon the defendants and sustained that position on appeal. Having now been ruled wrong after all these years, the prosecution takes refuge in the newly announced production-shifting rule and the failure of these defendants to meet that lesser burden. But, the defense had neither notice nor reason to undertake the lighter production burden when far more was required of them, and their failure to do so does not mean that they could not have shouldered the lesser burden of producing "some" evidence of registration.

The due process guaranteed by the Fourteenth Amendment prohibits judicial action making adverse changes in penal laws which would violate the Ex Post Facto Clause if attempted by the legislature. *Marks v. United States,* 430 U.S. 188, 191-92 (1977). The classic statement of these prohibited changes is found in *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798). One of the four classes of legislation condemned in *Calder* is: "Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." *Id.* at 390. As Chief Justice Marshall put it, "An *ex post facto law* is one which renders an act punishable in a manner in which it was not punishable when it was committed." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 138 (1810). Thus, this Court has struck down as *ex post facto* several procedural changes lightening the prosecutorial burden. *E.g., Thompson v. Utah,* 170 U.S. 343 (1898); *Kring v. Missouri,* 107 U.S. 221 (1883). More recently this Court has reversed convictions which were obtained by construing the criminal statute under which the defendant was charged in a way not known or apparent at the time of the alleged offense. *Rabe v. Washington,* 405 U.S. 313 (1972); *Bouie v. Columbia,* 378 U.S. 347 (1964); *cf. Cole v. Arkansas,* 333 U.S. 196, 201 (1948). A new

judicial decision affecting the burden of proof has the very same vice as one reconstruing the elements of the offense, when retroactively applied to uphold a conviction by changing the ground rules for trial long after the trial is over.

Permitting the prosecution to escape its constitutional burden of proving every element of the crime charged beyond a reasonable doubt because the accused—held by the trial judge to have the burden of persuasion as to one of the elements—did not first meet a burden of production as to that element which was contrary to the pronouncements of the Supreme Court of Pennsylvania and which was not announced until some five years after the trial, completely denigrates the values found critical in *Winship* and the cases which followed it.

In *Sandstrom* a state conviction was reversed because the jury may reasonably have misunderstood the burden of proof and what was required of each side with regard thereto. The outcome can be no different where it is the accused who has no reason to understand that something is required of the defense before the prosecution need meet its burden of proof. Any other result would be utterly faithless to the rationale of *Winship*.

CONCLUSION

This petition deals with a critical area of criminal procedure and issues which require decision. Any of the reasons here advanced warrants granting the writ, but in sum they fully justify plenary review.

Respectfully submitted,

/s/ Donald J. Goldberg
DONALD J. GOLDBERG
Attorney for Petitioner,
Kenneth Shalom Millrood

/s/ John Rogers Carroll
JOHN ROGERS CARROLL
Attorney for Petitioner,
James Kirchner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2119

KENNETH SHALOM MILLROOD,

Appellant,

vs.

SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. CIVIL No. 77-3572)

Submitted Under Third Circuit Rule 12(6)
June 4, 1979

Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges

JUDGMENT ORDER

After considering the contention raised by appellant, to-wit, that where state law provides that non-registration is an essential element of the crime of "possession with intention to . . . deliver a controlled substance by a person not registered," the due process clause of the Fourteenth Amendment invalidates a state conviction obtained without there being any proof at all as to non-registration, and considering that appellant failed to present "some

evidence of authorization sufficient to activate the risk of nonpersuasion for the Commonwealth" as required by *Commonwealth v. Sojourner,* — Pa. Super. — (No. 2387 October Term, 1976, filed June 22, 1979) (typescript opinion at 9), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ R. J. Aldisert
Circuit Judge

ATTEST:
/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

DATED: July 23, 1979.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2123

UNITED STATES OF AMERICA ex rel:
JAMES KIRCHNER,

Appellant,

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA, D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL No. 75-3689)

Submitted Under Third Circuit Rule 12(6)
June 4, 1979

Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges

JUDGMENT ORDER

After considering the contention raised by appellant, to-wit, that the lower court's denial of appellant's petition for writ of habeas corpus was improper because the state trial court's construction and application of § 13(a)(30) of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 et seq., violated ap-

pellant's federal due process rights by requiring him to bear the burden of proof on the issue of registration under a statutory charge of "possession with intent to . . . deliver a controlled substance by a person not registered under this act," and considering that appellant failed to present "some evidence of authorization sufficient to activate the risk of nonpersuasion for the Commonwealth" as required by *Commonwealth v. Sojourner*, — Pa. Super. — (No. 2387 October Term, 1976, filed June 22, 1979) (typescript opinion at 9), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ Aldisert
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN, Clerk

DATED: July 23, 1979.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 75-3689

UNITED STATES OF AMERICA ex rel.
JAMES KIRCHNER

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA, et al.

CIVIL ACTION

No. 77-3572

KENNETH SHALOM MILLROOD

vs.

SUPERINTENDENT LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

MEMORANDUM
(Filed June 24, 1978)

June 22, 1978.

BRODERICK, J.

Petitioners James Kirchner and Kenneth Shalom Millrood were tried and convicted in the Court of Common

Pleas of Lancaster County, Pennsylvania upon the charge of possession with intent to deliver marijuana and conspiracy in violation of 35 P.S. §780-113(a)(30). They were sentenced to a period of incarceration and fined. Both have filed petitions for writs of habeas corpus pursuant to 18 U.S.C. §2254 [1] contending that their constitutional rights were violated in that they were convicted of violating 35 P.S. §780-113(a)(30) even though the Commonwealth did not prove that they were not registered under the Act or registered or licensed by the appropriate State board.[2]

35 P.S. §780-113 provides in pertinent part:

> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. §780-121 provides:

> In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information or trial. The burden of proof of such exemption or exception shall be upon the person claiming it.

1. 18 U.S.C. §2254 provides in pertinent part:
(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

2. Petitioners raised other grounds for relief in their petitions, but waived them at oral argument.

At their trial, no evidence was produced by the Commonwealth to prove that defendants were not registered under the Act or were practitioners not registered or licensed by the appropriate State board. Defendants demurred to the evidence and sought a directed verdict on the ground, among others, that the Commonwealth had not met its burden of proving that they were not so registered. The trial judge denied their motions.

Petitioners contend that in order to be found guilty of violating 35 P.S. §780-113(a)(30), proof that they were neither registered nor licensed is an essential element of the crime, and that a defendant constitutionally cannot be required to bear the burden of proving registration and/or licensing. The critical determination for this Court is whether non-registration is an essential element of the crime defined in 35 P.S. §780.113(a)(30). If it is, the Commonwealth had the burden of establishing non-registration beyond a reasonable doubt, and the petitioners' writs should be granted.

As the Supreme Court has stated:

> [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364 (1970); *see also, Patterson v. New York*, — U.S. —, 97 S. Ct. 2319, 2327 (1977); *United States of America ex rel. Hickey v. Jeffes*, 571 F.2d 762, 764 (3d Cir. 1978).

When ruling on a petition for habeas corpus in connection with the application of a state statute, a federal district court takes the statute with the interpretation placed upon it by the courts of that state "as though that interpretation had been written into the statute by the state

legislature itself." *United States v. Deegan*, 294 F. Supp. 1347, 1350 (S.D.N.Y. 1969) (footnote omitted); *Schmidt v. Hewitt*, No. 77-1284 at 6 (3d Cir., filed February 24, 1978). As stated by the Supreme Court in *Mullaney v. Wilber*, 421 U.S. 684, 691 (1975), "state courts are the ultimate expositors of state law . . . and [federal courts] are bound by their constructions except in extreme circumstances . . . ." *Hallowell v. Keve*, 555 F.2d 103, 107 (3d Cir. 1977). This is equally true in the determination of what constitutes essential elements of a crime. *United States ex rel. Pendergrass v. Anderson*, 304 F. Supp. 577, 579 (D.Del. 1969).

The Pennsylvania Superior Court has recently considered this very statute. *Commonwealth v. Stawinsky*, 339 A.2d 91 (Pa. Super. 1975).[3] Stawinsky, like petitioners in the instant case, was charged with delivery of a con-

3. In determining the meaning of a state statute, a federal court is bound by the interpretation given the statute by the state's highest court. Turco v. State of Maryland, 324 F. Supp. 61, 65 (D.Md. 1971); *see* Schmidt v. Hewitt, No. 77-1284 (3d Cir., filed February 24, 1978). The *Stawinsky* decision was by the Pennsylvania Superior Court and not the Supreme Court of Pennsylvania. However, in Pennsylvania the Superior Court has

> exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any section of this act within the exclusive jurisdiction of the Supreme Court of the Commonwealth Court.

17 P.S. §211.302 (Supp. 1978-79); Commonwealth v. McCutchen, 369 A.2d 291, 292 (Pa. Super. 1976). The Supreme Court of Pennsylvania has a discretionary right of review of final orders of the Superior Court. 17 P.S. §211.204(a). The *Stawinsky* appeal concerned matters exclusively within the appellate jurisdiction of the Superior Court. The Supreme Court declined to review the decision. It is unclear whether the Superior Court's decision in a matter over which it has exclusive appellate jurisdiction (subject to review at the discretion of the Supreme Court) constitutes a binding decision on this Court. However, inasmuch as we feel that the Supreme Court of Pennsylvania would reach the same result as the *Stawinsky* court, particularly since it declined allocatur, we need not decide this issue. *See Turco*, 324 F. Supp. at 65; *cf.* Wright, *Law of Federal Courts* 269 (1976). Furthermore, the Supreme Court of Pennsylvania recently had the opportunity to reverse the holding of the *Stawinsky* court in the petitions for allocatur filed by both Millrood and Kirchner in their direct appeals from their conviction. The Supreme Court denied allocatur in each case.

trolled substance in violation of 35 P.S. §780(a)(30). At trial, the Commonwealth did not introduce evidence that he was not registered as provided in the Act. The Court held that "proving a defendant not be registered is not a necessary element of the crime of violating the Act." *Stawinsky*, 339 A.2d at 92. As analyzed by Judge Spaeth in his concurrence:

> another way of putting this question is to ask whether the exemptions cover an essential element of the crimes defined by §§13(a)(16) and 13(a)(30). If they do, the burden of proving them may not be placed on the defendant.
>
> The answer to this question is reached when §13(a)(14) is compared with §§13(a)(16) and 13(a)(30). Section 13(a)(14) applies only to a limited group of people (licensed practitioners) and was enacted to prevent this group from engaging in a particular kind of conduct, which is described in the "except" clause (prescription without examination). Membership in the limited group (status) is presumed in any prosecution under §13(a)(14), and proof of non-membership would only get the accused into deeper trouble, for the forbidden conduct by a non-practitioner would be worse than that conduct by a practitioner. Sections 13(a)(16) and 13(a)(30), on the other hand, apply generally to everyone. The exemption clauses in those sections do not refer to *conduct*, *i.e.*, to essential elements of the crimes (possession, sale, manufacture, or delivery), but to *persons* who are to be exempted (persons "registered under this act"). Thus the exemption applies if the accused has attained a certain status; it has nothing to do with the conduct that would constitute a crime if performed by someone else. Status does not con-

> stitute an essential element of the crimes. Rather, it only provides a personal defense. Thus the burden of proving it can be constitutionally shifted to the person claiming it.

Id. at 94-5. (footnote omitted).

Petitioners concede that the issue involved in the instant case is precisely that decided in *Stawinsky*. Petitioners contend, however, that *Commonwealth v. McNeil*, 461 Pa. 709, 337 A.2d 840 (1975), which was decided three weeks after *Stawinsky*, has changed the law in Pennsylvania. *McNeil* involved, among other things, a prosecution for carrying a firearm without a license in violation of 18 P.S. §4628(e), which provides:

> No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefore as hereinafter provided.

The Pennsylvania Supreme Court held that the absence of a license is an essential element of the crime, and therefore that the Commonwealth had the burden of establishing this element beyond a reasonable doubt. The distinction between *McNeil* and *Stawinsky* is obvious, each involved separate offenses which have been construed by Pennsylvania courts as entailing different essential elements of statutory crimes.

As stated in *Commonwealth v. Stoffan*, 323 A.2d 318, 323-24 (Pa. Super. 1974):

> The problem of deciding whether a particular clause states a fact that constitutes a necessary element of the crime is a problem of statutory construction. The answer depends on what behavior the General Assembly intended to prohibit. Any language referring to such behavior states a necessary element of the crime.

In considering this problem, a useful case is *Commonwealth v. Neal*, 78 Pa. Super. 216 (1922). There the statute in question made it a crime "for any person . . . to engage in the practice of medicine . . . except those hereinafter exempted . . . ." In the indictment the Commonwealth had not alleged that the defendant was not one of those exempted. Whether such an allegation was necessary depended on whether the exemption clauses referred to facts constituting elements of the crime. If they did, the allegation was necessary. In deciding whether the exemption clauses referred to elements this court enunciated the following test:

> When a statute defining an offense contains an exception, in the enacting clause, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the clause defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused.
>
> *Id.* at 219.

The Pennsylvania Superior court in *Stawinsky* reviewed the statute involved in the instant petitions and determined

that registration is an exception and not an essential element of the crime. We have found nothing in *McNeil* which leads us to conclude that the Supreme Court of Pennsylvania would interpret this statute in a manner inconsistent with *Stawinsky*, particularly in view of the fact that the Supreme Court of Pennsylvania denied allocatur in *Stawinsky* and likewise denied allocatur to both Kirschner and Millrood in this case subsequent to its decision in *McNeil*.

The construction of 35 P.S. §780-113(a)(30) by the Pennsylvania courts heretofore discussed does not violate petitioners' constitutional rights. *United States v. Rosenberg*, 515 F.2d 190, 199 (9th Cir.), *cert. denied*, 423 U.S. 1030 (1975); *Tritt v. United States*, 421 F.2d 928, 929-30 (10th Cir. 1970); *United States v. Benish*, 389 F. Supp. 557, 560 (W.D.Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975); *cert. denied*, 424 U.S. 954 (1976); *cf. Patterson v. New York*, U.S. , 97 S. Ct. 2319 (1977); *United States v. Byrne*, 422 F. Supp. 147, 162 (E.D.Pa. 1976), *aff'd in part, rev'd in part on other grounds*, 560 F.2d 610 (3d Cir. 1977), *cert. denied*, U.S. (1978).

Accordingly, we will enter an Order denying petitioners' motions for habeas corpus.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 75-3689

UNITED STATES OF AMERICA ex rel.
JAMES KIRCHNER

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA, et al.

CIVIL ACTION

No. 77-3572

KENNETH SHALOM MILLROOD

vs.

SUPERINTENDENT LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

ORDER
(Filed June 23, 1978)

AND NOW, this 22nd day of June, 1978, upon consideration of petitioners' motions for writs of habeas corpus, for the reasons set forth in a memorandum dated June 22nd, 1978, it is hereby ORDERED that said motions are DENIED.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2119

KENNETH SHALOM MILLROOD,

Appellant,

vs.

SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING
DOCKET NO. 78-2119

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Aldisert
Judge

Dated: August 22, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2123

UNITED STATES OF AMERICA ex rel:
JAMES KIRCHNER,

Appellant,

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA, D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA

SUR PETITION FOR REHEARING
DOCKET NO. 78-2123

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Aldisert
Judge

Dated: August 22, 1979

APPENDIX D

IN THE
COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA

Criminal Actions Nos. 931 and 932
of 1973

COMMONWEALTH OF PENNSYLVANIA

vs.

KENNETH SHALOM MILLROOD

JOHNSTONE, P. J.

This defendant, and an accomplice, were both charged with possession of marijuana with intent to deliver and conspiracy, and both were found guilty of both charges by a jury. Motions in arrest of judgment and for a new trial were timely filed on behalf of the defendant and these motions are before the court en banc on briefs filed, after argument.

Complaint is made that the court erred in refusing to suppress five large plastic bags of marijuana as evidence because certain provisions of section 780 of the Controlled Substance Act were not complied with. This section of the Act deals only with forfeiture of seized property and does not affect in any way the use or preservation of evidence to be used at trial. It is admitted that marijuana was seized pursuant to a lawful arrest and whether the evidence was "sealed" or whether process was issued against the evidence affects only the forfeiture of the marijuana and not its use as evidence against the persons charged with a violation of the Act.

The defendant next complains that he was indicted for an offense not alleged in the complaint and that no preliminary hearing was held on the offense charged in the indictment. In our view, it is unthinkable that the defendant or his counsel were not fully aware from the time the complaint was filed that he was being charged with the possession of marijuana with the intent to deliver the contraband. All the words were not used in the complaint but there is no room for doubt what the charges were against the defendant. We see no substantive defect in the failure of the complaint to state that the defendant possessed marijuana. He knew he had it in his possession and that the State Police seized a large quantity or marijuana from him. The defendant was fully informed at the preliminary hearing of what the charges were against him. This appears to us to be a super technicality which possesses no merit.

The complaint that the defendant was denied the right to call a particular witness is not founded in fact. The witness, Blunt, referred to by the defendant is a State Trooper who was not present at the hearing and who had not been subpoenaed by the defendant. Pa. R. Crim. P. 141(c)(3) does give the defendant the right to call witnesses at a preliminary hearing but if a witness is not at the hearing and has not been subpoenaed by the defendant, we know of no requirement on the part of the Commonwealth to produce witnesses for the defendant's benefit. The defendant and his counsel knew that the Commonwealth did not intend to call Blunt to make out a prima facie case and if they wanted to call him as a witness, then the responsibility was theirs to see that he was at the hearing and available as a witness.

The District Attorney of Lancaster County, through the County Detective, has for years obtained a very brief thumb nail sketch of prospective jurors caled for jury duty during criminal trial weeks. Defense counsel when they saw the

District Attorney refer to a list demanded to know what the list was and to examine the list themselves. The defendant's motion was denied and in our view Commonwealth v. Foster, 219 Pa. Superior Ct. 127, supports the Court's ruling. Never having seen the District Attorney's investigation we do not know precisely what it contains. Through the years we have learned, however, that a check is made to determine if any of the prospective jurors have a prior criminal record. We are satisfied that if the defendant had the benefit of the investigation, he would have nothing more than a few questions on voir dire would produce.

The complaint of the defendant that Commonwealth did not present an unbroken chain of custody of the marijuana seized is just not based on fact. The evidence was in the custody of the State Police at all times and there was ample testimony to support that statement.

Finally, complaint is made that the Commonwealth did not prove that the defendant did not have a license or was not registered as a practitioner by the Board. There are, of course, no licenses to possess or distribute marijuana issued by the Board or anyone else. If there were, it would be a defense which the defendant would be required to prove. What the defendant suggests is not an element of the offense charged against the defendant and there is no burden on the Commonwealth to prove a lack of registration.

The defendant may not have had a perfect trial but he had a fair one, and that is all to which he is entitled.

AND NOW, July 30, 1974, the defendant's motions in arrest of judgment and for a new trial are denied and he is directed to appear for sentence at the call of the District Attorney.

BY THE COURT:

/s/
W. G. JOHNSTONE, JR.

Supreme Court, U.S.
FILED
OCT 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-466

KENNETH SHALOM MILLROOD,

Petitioner,

vs.

SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

---

UNITED STATES OF AMERICA ex rel: JAMES KIRCHNER,

Petitioner,

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA; D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

JOSEPH C. MADENSPACHER,
Assistant District Attorney,
Attorney for Respondent,

Lancaster County Courthouse,
Lancaster, Pennsylvania 17602
(717) 299-8190

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CODES CITED:

21 U.S.C. 841 1

21 U.S.C. 885(a)(1) 1

REASONS FOR DENYING WRIT

The petitioners in this case were jointly tried, convicted, and sentenced for a violation of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. 780-101 *et seq*. The applicable section is in 35 P.S. 780-113, as follows:

> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, as knowingly creating, delivering or possession with intent to deliver, a counterfeit controlled substance.

The Pennsylvania act, like the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 841, contains the following clause at 35 P.S. 780-121.

> "In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information, or trial. The burden of proof of such exemption or exceptions shall be on the person claiming it."

The federal act at 21 U.S.C. 885(a)(1) states that:

> "it shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter . . . in any trial, hearing or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption shall be on the person claiming its benefit."

At the time of the petitioner's trial the governing law was that of *Commonwealth v. Stawinsky*, 234 Pa. Super. 308, 339 A.2d 91 (1975) which held that it was the burden of the defendant to prove his authorization by a preponderance of the evidence. Subsequently, however the Superior Court of Pennsylvania modified its decision in *Stawinsky* and held that non-authorization (lack of authority, license, and registration) is an element of the crime, and the Commonwealth would have the burden of proving it beyond a reasonable doubt, however, although the Commonwealth has the burden of persuasion, it does not have the burden of production. The Court stated that a defendant must come forward with some evidence of authorization before the Commonwealth need disprove authorization beyond a reasonable doubt. *Commonwealth v. Sojourner*, — Pa. Super. —, — A.2d — (No. 2387 October Term, 1976, filed June 22, 1979, opinion by President Judge Cercone).

This decision is in accordance with the interpretation given to the Comprehensive Drug Abuse and Control Act of 1970. *United States v. Rosenberg*, 515 F.2d 190, (Ninth Cir., 1975), *United States v. Collier*, 478 F.2d 268 (Fifth Cir., 1973), *United States v. Kelly*, 500 F.2d 72 (Seventh Cir., 1974). In *Collier, supra*, the Court stated:

> In considering the issue of burden of proof, one must distinguish between the burden of persuasion and the burden of going forward with the evidence. Of course, the burden of persuading the jury beyond a reasonable doubt that the defendant committed every essential element of the offense charged remains upon the prosecution throughout the trial. This precise constitutional attack on the predecessor to the present act was rejected by this Circuit in United States v. Ramzy, 446 F.2d 1184 (5 Cir. 1971). See also United States v. Rowlette, 397 F.2d 475 (7 Cir. 1968).

Pennsylvania law is thus in accord with federal law in this particular area. Both agree that the burden of going forward may be on the defendant, but both also agree that ultimately the prosecution would have the burden of proof, and such proof would be proof beyond a reasonable doubt. In fact, this Court in *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2318 (1977), specifically approved the procedure adopted by the Superior Court of Pennsylvania in *Sojourner*, and a reading of *Sojourner* indicates that *Patterson* played a strong role in influencing the Superior Court to decide *Sojourner* as it did.

The procedural history of this case indicates that this precise question, involving one of these petitioners, was before this Court, *Millrood v. Pennsylvania*, 434 U.S. 826, 54 L.Ed.2d 84, 98 S. Ct. 75 (1977), however, at that time the petitioner Millrood was requesting the writ of certiorari be directed to the Supreme Court of Pennsylvania. The petition was denied on October 3, 1977. The only difference with this petition and the former one is that Millrood is joined in this by his co-defendant Kirchner, and the petition requests that the writ issue to review the judgment of the United States Court of Appeals for the Third Circuit.

The primary cases relied on for granting the writ are *In Re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S. Ct. 1881 (1975), *Patterson v. New York, supra*, and *Sandstrom v. Montana*, — U.S. —, 61 L.Ed.2d 39, 99 S. Ct. 2450 (1979). Of these cases all but *Sandstrom* had been decided prior to the denial of the petition for a writ in *Millrood v. Pennsylvania, supra*. The addition of *Sandstrom* to the first three (3) cases does nothing to aid the petitioners' arguments. The decision of the Pennsylvania courts, and the United States Court of Appeals for the Third Circuit, in this case, are harmonious with the decisions in *Winship, Mullaney, Patterson*, and *Sandstrom*.

CONCLUSION

Because this petition deals with an area of law in which both the Courts of the United States and the Commonwealth of Pennsylvania are in agreement on, and which no decision is further required, the request for a writ of certiorari should be denied.

Respectfully submitted,

OFFICE OF THE DISTRICT ATTORNEY

By: /s/ Joseph C. Madenspacher
JOSEPH C. MADENSPACHER
Assistant District Attorney